FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 145

H. SANTAELLA & BROTHER, INC.,
Petitioner,

vs.

RAFAEL BUSCAGLIA, TREASURER, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

F. FERNANDEZ CUTAR,
Counsel for Petitioner.

MARIANO ACOSTA VELARDE,
DANIEL PELTON, JR.,
Of Counsel.

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Rico from Continental United States and paid the sum of $857,782.73 into the Treasury of Puerto Rico to cover the "additional" excise taxes levied by law.[1] In 1944 and 1945 the special statutes under which petitioner was compelled to pay said "additional" excise taxes were declared unconstitutional, and therefore null and void, by the Supreme Court of Puerto Rico.[2] Refunds of the "additional" excise were consequently decreed by the Insular Supreme Court in favor of several taxpayers.[3] Several months after the Supreme Court of Puerto Rico held invalid said taxing acts, petitioner filed with the Insular Treasurer, a written claim for refund of the sums paid by it as heretofore stated (R. 65). Ten months later, petitioner was notified that its claim for refund had been refused (R. 67). Petitioner then filed its complaint in the Tax Court of Puerto Rico, seeking a decree for refund.[4] The Tax Court dismissed the complaint for lack of jurisdiction (R. 88). On review[5] the Insular

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[1] The ordinary or normal excise on cigarettes has existed in the insular legislation since 1925 (Laws of Puerto Rico, 1925, p. 594). For certain purposes not here material, in 1939 the Legislative Assembly of Puerto Rico levied an "additional" excise tax on cigarettes, amounting to 50 cents on each one thousand cigarettes imported into the Island. (Laws of Puerto Rico, Special Session, 1939, page 100; amended by Act No. 149, approved May 6, 1940, Laws of Puerto Rico, 1940, page 900, and by Act No. 28 approved December 3, 1942, Laws of Puerto Rico, 2d & 3d Special Session, 1942, pages 118-120.) A detailed schedule showing the various payments made, dates of such payments, whether voluntarily or under protest, and other pertinent data, is annexed to this Petition. See Appendix, p.

[2] *Puerto Rico Tobacco Corporation* v. *Buscaglia, Treasurer,* 62 P. R. R. 782 (1944); and *Axton Fisher Tobacco Co.* v. *Buscaglia, Treasurer,* 65 P. R. R. 125 (1945).

[3] *Ibid.*

[4] The procedural right to invoke the jurisdiction of the Tax Court was predicated upon two alternative grounds, viz.: the provisions of an "Act for the Repayment of Taxes Improperly Collected," approved Feb. 12, 1904 (Laws of Puerto Rico 1904, p. 182) as amended by Act No. 10, approved March 29, 1945; or the provisions of the act creating the Tax Court of Puerto Rico, approved May 15, 1943 (Laws of Puerto Rico 1943, p. 600).

[5] Section 5 of the law creating the Tax Court of Puerto Rico provides for the review by the Supreme Court of all final judgments of the Tax Court. (Laws of Puerto Rico, 1943, p. 610.)

Supreme Court reversed the ruling of the Tax Court and held that the jurisdiction of said court was properly invoked by petitioner (R. 51). It further held that the "additional" excises paid by this petitioner had been "unlawfully collected" from it by the Treasurer (R. 47). However, a majority of the Court[6] was of the opinion that petitioner had not used the correct or appropriate procedure to seek redress. It held that refunds could be granted only if payment was shown to have been made under protest and if complaint for refund was shown to have been filed within the time limited by the statute providing for payment of taxes under protest.[7] Since petitioner, in making the various payments complained of, had not complied with either one or both of the requirements of the 1927 Act, the Insular Supreme Court held the right to refund totally barred. Regarding the statutes relied upon by petitioner,[8] said court ruled that the 1904 Act "did not establish any right in favor of the taxpayer, or contain any provision fixing a term for the filing of an application for refund" (R. 48); and, further, with reference to the alternative ground invoked by petitioner, viz., the 1943 Act creating the Tax Court of

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[6] The Supreme Court of Puerto Rico is composed of a Chief Justice and four Associate Justices (48 USCA Sec. 861; General Order No. 118, promulgated by Brigadier-General Davis, U. S. Army, on August 16, 1899). In the case at bar, only three of the five justices intervened.

[7] The majority of the Court *in this instance* held that the only procedural legislation available for recovery of taxes unlawfully collected was found in "An Act Providing for the Payment of Taxes under Protest, etc.," approved April 16, 1927 (Laws of Pureto Rico, 1927, p. 122-126), as amended by Act No. 17, approved November 21, 1941 (Laws of Puerto Rico, Special Session, 1941, p. 54). Thirteen months later, while this case was pending decision by the Circuit Court of Appeals, the full personnel of the Insular Supreme Court decided, as here contended by petitioner, that a taxpayer can seek redress under the provisions of the Acts of 1904 and 1943. See footnote 4, *ante*. A petition for rehearing, filed in the Court below called the attention of the Circuit Court of Appeals to this virtual reversal of opinion, but the court below refused to reconsider (R. 136, 145; 166 F. (2d) 970).

[8] See footnote 4, *ante*.

Puerto Rico, the Insular Supreme Court held that said Act did not revive barred rights to refunds, but only conferred jurisdiction on the Tax Court "to take cognizance of cases of refund of taxes" (R. 53).

On appeal, the Circuit Court of Appeals affirmed, essentially on the ground that there was no manifest or inescapable error in the decision of the Insular Supreme Court. However, one week before the Circuit Court handed down its opinion and judgment, the Supreme Court of Puerto Rico decided the case of *Gerardino* v. *Tax Court of Puerto Rico*,[9] holding that the Act of 1943 provides a judicial remedy for the recovery of excise taxes unlawfully collected, "without reference to the voluntary or involuntary nature of the payment" (R. 129). It further specifically held that under the Act of 1904 a refund could be obtained from the Treasurer of Puerto Rico if petition therefor was filed within the time limited by a 1946 amendment to said Act.[10] The Insular Supreme Court pointedly stated that, after the enactment of the act creating the Tax Court of Puerto Rico (the Act of 1943), the phrase "payment under protest" lost most of its magic; that prior thereto "the failure to pay under protest meant that no judicial remedy existed to recover overpayments," and that "the fact that a taxpayer who pays excise taxes under protest fails thereafter to avail himself of the remedy provided by Acts Nos. 8

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[9] The text of this opinion shall be found at pp. 118 to 135 of the record herein.

[10] It should be noted that, prior to 1946 (Act No. 261, Laws of P. R. 1946, p. 540) there was no time limitation for the filing with the Treasurer of applications for refund. The first and only legislative action directed towards fixing a time limitation occurred in 1946, as noted. Prior thereto, the Insular Legislature had implicitly recognized the fact that refunds under the Act of 1904 were being claimed and granted, and in 1945 it amended said Act so as to facilitate and expedite the procedure for the obtainment of refunds (Act No. 10, Laws of P. R. 1945, p. 32).

and 17 (the 1927 Acts) does not necessarily mean that he is also barred from utilizing the different remedy provided by par. 4 of the Act of 1943." [11]

It may not be amiss to call this Court's attention to the significant fact that the Gerardino decision was rendered by all the five justices of the Insular Supreme Court, while the decision in the case at bar was made by only three justices of said Court. At any rate, the Gerardino decision is, in substance and effect, a complete reversal of the position adopted by the insular court in this case. Such reversal of local doctrine having occurred *prior* to the decision of the appeal before the Circuit Court, it is obvious that the court below should have paid it the deference ordained by the rule as repeatedly stated by this Court.[12]

In consequence, petitioner filed in the Court below its petition for rehearing [13] calling the Court's attention to the local doctrine as established in the *Gerardino* case, and including a certified copy of the opinion rendered in said case.

The Circuit Court denied rehearing on the ground that the Gerardino decision was distinguishable from the case at bar in that Gerardino paid his excise taxes *after* the Act of 1943 had become effective, while petitioner herein had made his payments of the taxes in question *before* the passage of the Act of 1943. However, the court below evidently failed to grasp the full import of the Gerardino decision, which definitely established the taxpayers' *two* alternative and separate remedies for refund, viz., payment under protest and action for recovery under the Act of 1927; *or* payment, whether voluntary or under protest, and, within the time limitation of four years recently fixed, petition with the

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[11] R. 129.

[12] The most recent and pointed expression of this rule of deference may be found in *De Castro* v. *Board of Commissioners*, 322 U. S. 451 (1944).

[13] R. 106.

Treasurer for refund, and within 30 days after denial thereof, suit in the Tax Court to compel refund.[14] The fact that the Circuit Court misconstrued the *Gerardino* case was made evident a short time later by several decisions of the Insular Supreme Court. In the *Mayaguez Light, Power & Ice Co.* v. *Tax Court of Puerto Rico* and in *Ana Maria Sugar Co. Inc.* v. *Tax Court of Puerto Rico* and in *International General Electric S. A. Inc.* v. *Tax Court of Puerto Rico,*— all these cases decided March 31, 1948—the Supreme Court of Puerto Rico construed and applied the Act of 1904 and held, by decision of all five justices, that a taxpayer was entitled, under its provisions, to a refund of taxes paid during the years 1941, 1942, 1943 and 1944.[15] It will be noted that these decisions involved refunds of payments made prior to 1943. These latest decisions of the Insular Supreme Court interpreting the local tax refund statutes stand in direct conflict with the Circuit Court's construction, as expressed in its order denying rehearing.

Leave to file a second petition for rehearing having been granted, the attention of the Circuit Court was particularly called to these decisions of the Insular Supreme Court. Nevertheless, the Court below denied reconsideration without filing any further opinion.[16]

Statement of Jurisdiction

The jurisdiction of this Honorable Court is invoked under the provisions of Sec. 240 (a) of the Judicial Code of the United States, as amended by the Act of Feb. 13, 1925, C. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. A. 347).

The judgment of the Circuit Court of Appeals for the First Circuit was entered on February 27, 1948, and is

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[14] R. 131-132.

[15] The text of the opinion delivered in the three cases cited will be found at p. 139 of the Record herein.

[16] The order denying the second petition for rehearing was entered April 23, 1948. R. 145.

officially reported at 166 F. (2d) 966-970. The first petition for rehearing was denied April 9, 1948 (R. 136), and the second petition for rehearing was denied April 23, 1948 (R. 145).

Questions Presented

1. A rule long established by numerous decisions of this Court is substantially to the effect that it is the duty of a federal appellate court [17] to ascertain and apply state or territorial law in a case in which such law is controlling. A necessary corollary of this doctrine requires the reversal on appellate review of any judgment of a federal court, ruled by local law and correctly applying that law when the judgment was rendered, if in the meantime the state or territorial courts have modified or clarified their former rulings and adopted different ones.

The primary question posed in the case at bar is whether or not the Circuit Court has decided an important question of local taxing law in a way openly in conflict with applicable local decisions. Here, the judgment of the Circuit Court was undoubtedly ruled by local law represented by the decision rendered by the Insular Supreme Court in this case. However, such "local law" was modified by that court prior to the judgment of the federal appellate court. Therefore, at the time when such judgment was rendered, it did not apply correctly the "local law,"—indeed, it was in conflict therewith.

The decision originally rendered by the Insular Supreme Court in this case held, in substance and effect, that a taxpayer in Puerto Rico, seeking refund of taxes illegally collected from him, had only *one* remedy to enforce his right, to wit, that provided in the Act of 1927 which re-

[17] Undoubtedly the Circuit Court of Appeals is a Federal appellate court.

quired payment under protest and filing of action to recover within a limited time. While the appeal taken to the Circuit Court was pending, the Insular Supreme Court reversed its ruling on this specific procedural point, and held that the taxpayer may resort to either of *two* available remedies, to wit, the procedure above outlined under the Act of 1927, or payment, either voluntary or under protest, and within four years thereafter application for refund under the provisions of the Act of 1904 to the Insular Treasurer, and, upon denial thereof, suit before the Tax Court of Puerto Rico as provided by the Act of 1943.

Inasmuch as petitioner has exercised its right to refund by following one of the two alternative procedures sanctioned by the latest ruling of the Insular Supreme Court, it is obvious that the judgment below, in denying relief, stands in open conflict with the applicable local law which, even at the time the judgment below was entered, approved of the procedure followed by this petitioner.

Such conflict was emphasized shortly thereafter by subsequent decisions of the local court. The Court below, when acquainted with the modification of local law as effected by the Insular Supreme Court, refused to recognize the change and attempted to take the case at bar out of the scope of the new doctrine by stating that the payments here sought to be recovered had been made before the passage of the Act of 1943, creating the Tax Court of Puerto Rico, while the payments involved in the decision establishing the new ruling had been made after the passage of said Act of 1943. But such distinction had by then been implicitly repudiated by the Insular Supreme Court in a line of decisions, granting refunds of taxes paid *before* 1943. When this line of decisions was brought to the attention of the Circuit Court it simply denied rehearing without opinion.

Therefore, the main question here presented is whether or not the judgment of the Circuit Court should be reversed as being in conflict with the applicable local law as construed and interpreted by the latest decisions of the Supreme Court of Puerto Rico.

Reasons Relied On for the Allowance of the Writ

This case involves the important question as to the deference that must be paid by the Circuit Court of Appeals to local decisions upon matters of purely local concern, and as to whether the Circuit Court of Appeals may superimpose its criterion and interpretation of local statutes over that given by the Supreme Court of Puerto Rico at the time of the disposition of the case by the Circuit Court; and as to whether a judgment of the Circuit Court is correct or erroneous when at the time of entering such judgment it is in conflict with the latest local decisions.

To hold, as the Circuit Court of Appeals did, that "it hardly makes sense to suppose that there co-existed another legal remedy available to taxpayers whether they paid under protest or not," and further to hold that the taxpayer in Puerto Rico has only *one* remedy for the refund of taxes illegally collected, notwithstanding the rulings of the Insular Supreme Court to the effect that such taxpayer has *two* alternative remedies to obtain tax refunds, is clearly a superimposition of criterion and a lack of the deference due to the understanding and interpretation of local taxing statutes by the highest insular court, as well as an inobservance or disregard of the long established and time honored doctrine of this Court to the effect that the decision of the highest court of a state or territory on matters of local law is conclusive, and that the Circuit Courts of Appeals must apply and ascertain the local law as de-

clared by the highest court of the state as of the time when the appeal is disposed of, and not as of the time when the judgment appealed from was rendered. The doctrine has been specifically applied in cases appealed to the Circuit Court of Appeals for the First Circuit from the Supreme Court of Puerto Rico. *De Castro* v. *Board of Commissioners*, 322 U. S. 451, 88 L. Ed. 1384.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be granted herein, and that the judgment of the Circuit Court of Appeals for the First Circuit in the case at bar be reversed.

F. FERNANDEZ CUYAR,
Attorney for Petitioner.

MARIANO ACOSTA VELARDE,
DANIEL PELLON LAFUENTE,
Of Counsel.

APPENDIX

That the petitioner paid the internal-revenue taxes to the Treasurer of Puerto Rico, some under protest and others voluntarily, as it appears in detail hereafter, to wit:

Date of Declaration	Int. Rev. Invoice No.	Amount in Thousands	Taxes Protested	Taxes Not Protested
1939				
6/21	10622	7,470		$3,735.00
6/29	10624	7,490		3,745.00
7/6	10626	9,500		4,750.00
7/13	10628	7,500		3,750.00
7/20	10630	7,490		3,745.00
7/28	10632	10,700		5,350.00
8/3	10634	8,200		4,100.00
8/15	10636	7,510		3,755.00
8/23	10639	1,493		746.50
8/23	10640	6,330		3,165.00
8/29	10642	4,680		2,340.00
9/13	10644	6,500		3,250.00
9/13	10647	6,440		3,220.00
9/27	10648	6,500		3,250.00
9/27	1251	6,500		3,250.00
10/10	1252	13,090		6,545.00
10/10	1255	1,000		500.00
10/26	1256	6,500		3,250.00
10/26	1260	7,750		3,875.00
10/31	1261	6,750		3,375.00
11/15	1263	6,750		3,375.00
11/15	1264	6,750		3,375.00
11/28	1267	6,750		3,375.00
11/28	1270	10,160		5,080.00
12/14	1272	6,750		3,375.00
12/14	1275	7,750		3,875.00
12/28	1277	6,760		3,880.00
12/28	1280	25,750		12,875.00
12/28	1281	2,000		1,000.00
1940				
1/23	1284	8,660		4,330.00
1/23	1287	8,650		4,325.00
1/30	1290	12,150		6,075.00
2/4	1291	8,650		4,325.00
2/14	1294	8,650		4,325.00
2/27	1295	8,650		4,325.00
2/28	1298	8,650		4,325.00
3/12	1300	8,650		4,325.00
3/13	14553	9,650		4,825.00
3/20	14556	9,650		4,825.00
3/28	14558	11,660		5,830.00
4/10	14560	7,650		3,825.00
4/10	14563	11,150		5,575.00
4/24	14565	9,150		4,575.00
4/24	14567	9,150		4,575.00
5/9	14571	11,150		5,575.00
5/9	14573	9,150		4,575.00
5/20	14576	11,150		5,575.00

Date of Declaration	Int. Rev. Invoice No.	Amount in Thousands	Taxes Protested	Taxes Not Protested
1940				
5/21	14578	9,150		4,575.00
5/28	14580	12,450		6,225.00
6/11	14584	9,150		4,575.00
6/11	14585	9,650		4,825.00
6/27	14588	9,610		4,805.00
6/27	14591	9,650		4,825.00
7/10	14593	8,650		4,325.00
7/10	14596	8,660		4,330.00
7/24	14597	9,950		4,975.00
7/24	14600	10,650		5,325.00
7/30	29404	10,450		5,225.00
8/11	29405	9,150		4,575.00
8/16	29408	9,150		4,575.00
8/27	29410	9,150		4,575.00
8/27	29413	9,490		4,745.00
9/11	29416	9,250		4,625.00
9/11	29419	9,500		4,750.00
9/25	29420	9,500		4,750.00
9/25	29423	12,750		6,375.00
10/10	29425	9,250	$4,645.00	
10/10	29428	9,250	4,625.00	
10/24	29430	9,250	4,625.00	
10/24	29433	9,500	4,750.00	
10/31	29434	9,510	4,755.00	
11/14	29438	9,500	4,750.00	
11/14	29441	9,500	4,750.00	
11/29	29442	10,010	5,005.00	
11/29	29445	9,500	4,750.00	
12/12	29448	10,510	5,255.00	
12/12	29449	9,500	4,750.00	
12/18	16254	10,000	5,000.00	
12/31	16256	9,500	4,750.00	
1941				
1/8	16261	17,950		8,975.00
1/8	16262	6,750		3,375.00
1/30	16267	14,010		7,005.00
1/30	16270	13,000		6,500.00
2/13	16272	9,500		4,755.00
2/13	16275	12,500		6,250.00
2/26	16278	9,500		4,750.00
2/26	16281	10,500		5,250.00
3/13	16284	11,740		5,870.00
3/13	16287	10,500		5,250.00
3/26	16290	11,500		5,750.00
3/26	16294	10,810		5,405.00
4/9	16295	10,810		5,405.00
4/9	16298	14,000		7,000.00
4/25	6251	10,560		5,280.00
4/25	6254	10,500		5,250.00
4/30	6256	10,460		5,230.00
5/7	6259	21,500	10,750.00	
5/13	6262	10,500	5,250.00	
5/29	6267	10,500	5,250.00	
5/29	6270	10,500	5,250.00	
6/12	6273	10,500	5,250.00	
6/12	6276	10,460	5,230.00	
6/26	6279	10,000	5,000.00	

Date of Declaration	Int. Rev. Invoice No.	Amount in Thousands	Taxes Protested	Taxes Not Protested
1941				
6/26	6283	10,460	5,230.00	
7/9	6287	9,540	4,770.00	
7/9	6290	13,000	6,500.00	
7/24	6292	11,350	5,675.00	
7/24	6293	1,150	775.00	
7/24	6296	950	475.00	
7/24	6297	12,300	6,150.00	
7/31	6299	10,800	$5,400.00	
8/9	5103	2,002.45	1,001.23	
8/9	5104	34,460	17,230.00	
8/29	5112	10,800	5,400.00	
9/10	5115	70	35.00	
9/12	5116	10,800	5,400.00	
9/12	5119	10,800	5,400.00	
9/25	5122	10,000	5,000.00	
9/25	5125	11,250	5,625.00	
10/9	5128	10,150	5,075.00	
10/15	5131	10,150	5,075.00	
10/23	5134	2,650	1,325.00	
10/23	5137	800	400.00	
10/23	5138	10,990	5,495.00	
10/30	5139	11,700	5,850.00	
11/12	5141	15,200	7,600.00	
11/12	5142	15,210	7,605.00	
11/28	5148	12,250	6,125.00	
12/5	20852	12,240	6,120.00	
12/11	20854	12,270	6,135.00	
12/16	20857	12,250	6,125.00	
12/20	20861	6,750	3,375.00	
12/31	20864	10,510	5,255.00	
1942				
1/9	20867	31,500	15,750.00	
1/29	20871	10,490	5,245.00	
2/10	20875	10,320	5,160.00	
2/10	20876	14,500	7,250.00	
2/18	20879	14,000	7,000.00	
2/26	20881	24,030	12,015.00	
3/11	20886	13,120	6,560.00	
3/26	20893	12,500	6,250.00	
3/26	20894	12,500	6,250.00	
4/2	20896	18,750	9,375.00	
4/9	20898	1,500	750.00	
4/9	20899	5,000	2,500.00	
4/9	20900	24,250	12,125.00	
4/17	33752	5,000	2,500.00	
4/28	33754	12,000	6,000.00	
4/28	33755	5,000	2,500.00	
4/28	33756	14,500	7,250.00	
4/28	33757	10,000	5,000.00	
5/8	33759	7,450	3,725.00	
5/12	33760	13,000	6,500.00	
5/27	33762	10,500	5,250.00	
5/27	33763	2,790	1,395.00	
5/27	33764	10,000	5,000.00	
6/2	33765	2,000	1,000.00	
6/24	33769	5,500	2,750.00	
6/24	33770	12,800	6,400.00	

Date of Declaration 1942	Int. Rev. Invoice No.	Amount in Thousands	Taxes Protested	Taxes Not Protested
6/29	33771	14,000	7,000.00	
7/7	33773	16,330	8,165.00	
8/19	33774	33,150		$16,575.00
9/28	33775	14,270		7,135.00
10/13	33776	50,230		25,115.00
		1,715,565.45	$422,661.23	$435,121.50

RECAPITULATION

Excise taxes paid under protest	$422,661.23
Excise taxes paid not under protest	435,121.50
	$857,782.73

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 145

R. SANTAELLA & BROTHER, INC.,
Petitioner,

vs.

RAFAEL BUSCAGLIA, TREASURER, ET AL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This case arose on substantially similar facts and presents identical questions of law as the *Tristani et al.*, v. *Buscaglia, Treasurer, et al.*, case. Both cases were heard together on appeal and submitted on a single brief. Wherefore, petitioner respectfully submits as its brief in support of the petition for the writ of certiorari, the brief filed in the *Tristani* case.

F. FERNANDEZ CUYAR,
Attorney for Petitioner.

MARIANO ACOSTA VELARDE,
DANIEL PELLON, JR.,
Of Counsel.